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No.____

IN THE

Supreme Court of the United States

October Term, 1983

GEORGE X. SCHWARTZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government's conduct of the ABSCAM operation violated the most basic standards of due process and fundamental fairness, reaching and exceeding that degree of outrageousness which mandates dismissal of this prosecution?

2. Whether a "bifurcated" entrapment instruction, which submits to the jury a question of law reserved to the court, shifts the burden of proof and potentially withdraws the entrapment defense from the jury's consideration, is constitutional error which must be reversed unless harmless beyond a reasonable doubt? And if so, whether such instruction in the instant case was harmless?

3. Whether, where the evidence of governmental inducement is overwhelmimg, the government can meet its burden to disprove entrapment when the only proof of predisposition offered is the fact that the defendant committed the criminal act, which proof demonstrates neither his pre-existing criminal inclination nor familiarity with criminal techniques and procedures, and was manufactured, in its entirety, by the government?

4. Whether, given the constitutional limitations inherent in Congress' power to legislate under the commerce clause, federal jurisdiction under the Hobbs Act can be predicated upon wholly fictitious facts and circumstances which could never have had, at any time, any actual or potential effect on interstate commerce, and which "facts," in any event, were formulated and injected into the transaction in question by the government?

5. Whether, under the Hobbs Act, criminal convictions for extortion can be sustained absent proof of a demand or request by the defendants charged?

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No.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner above named respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on 21 February 1984, rehearing and rehearing *en banc* denied on 20 March 1984.

OPINIONS BELOW

The Third Circuit's order entered 28 March 1984, staying issuance of the mandate until 19 May 1984, is reprinted at PA-43.[1]

1. References to the Appendix to this Petition for Writ of Certiorari are designated "PA____".

The Third Circuit's order entered 20 March 1984, denying rehearing and rehearing *en banc*, is reprinted at PA-42.

The Third Circuit's judgment entered 21 February 1984, on re-appeal after remand and affirming the district court's entry on 31 January 1983 of judgment of conviction and imposition of sentence after remand, is reprinted at PA-41. The opinion of the panel of the Third Circuit filed 21 February 1984 (*per* Seitz, C.J.) ("*Schwartz II*") is not yet reported but is reprinted at PA-1.

The district court's judgment and imposition of sentence entered 31 January 1983 on remand (E.D. Pa., *per* Fullam, J.) is reprinted at PA-44.

The Third Circuit's opinion *en banc* filed 11 February 1982 (*per* Sloviter, J., Aldisert and Weis, J.J., dissenting) ("*Schwartz I*"), reversing the district court's order entered 26 November 1980 (setting aside the jury's verdict of conviction, dismissing the Hobbs Act conspiracy count and granting a judgment of acquittal *n.o.v.*), is reported *sub nom United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1106, 102 S. Ct. 2906 (1982), *reprinted at* PA-47.

The district court's opinion and order entered 26 November 1980, setting aside the jury's verdict of conviction, *etc.*, is reported *sub nom. United States v. Jannotti*, 501 F.Supp. 1182 (E.D. Pa. 1980) (*per* Fullam, J.), *rev'd*, 673 F.2d 578 (3rd Cir. 1981), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2906 (1982), *reprinted at* PA-175.

JURISDICTION

The Third Circuit's judgment entered 21 February 1984 affirmed the district court's judgment of conviction and imposition of sentence on remand. Petitioner Schwartz' timely filed petition for rehearing and suggestion of rehearing *en banc* was denied by order entered 20 March 1984. The 60 days in which to file a petition for writ of certiorari ended on Saturday, 19 May 1984. The instant Petition for Writ of Certiorari, filed on or before 19 May 1984, is timely.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, *reprinted at* PA-273.

The Hobbs Act, 18 U.S.C. §1951, *reprinted at* PA-273.

The Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §1962, *reprinted at* PA-274.

STATEMENT OF THE CASE

A. *Procedural Background.*

Petitioner Schwartz, along with other Philadelphia ABSCAM victims, was indicted for conspiracy under the Hobbs Act (18 U.S.C. §1951) and RICO Act (18 U.S.C. §1962), and also for attempts to violate the Hobbs Act. The district court dismissed the attempt charges prior to trial and the government did not appeal. Schwartz was tried jointly with Philadelphia ABSCAM victim Harry Jannotti on the two conspiracy counts. After a six day

jury trial, petitioner Schwartz was convicted of both the Hobbs Act and RICO conspiracy charges.[2]

After verdict, Schwartz and Jannotti moved for judgments of acquittal. By Memorandum and Order entered 26 November 1980, the district court set aside the verdict in its entirety, dismissed the Hobbs Act conspiracy counts for lack of jurisdiction, and granted the motions for judgment of acquittal. 501 F.Supp. 1182, PA-175.

The government appealed and the United States Court of Appeals for the Third Circuit, sitting *en banc*, reversed the district court's decision by a seven-to-two vote (*Schwartz I*, 673 F.2d 578, Pa-47) and directed reinstatement of the jury verdict.

Schwartz and Jannotti jointly petitioned this Court for a writ of certiorari (No. 81-1899, Petition for Writ of Certiorari), which the United States opposed on the ground that review by this Court at that time was premature because judgment and sentence had not then been imposed (*id.*, Memorandum for the United States in Opposition). This Court denied certiorari. 457 U.S. 1106, 102 S.Ct. 2906 (1982).

On remand by the Third Circuit to the district court, the district court denied Schwartz' additional post-trial motions, reinstated the jury's verdict and entered judgment and imposed sentence. PA-44. On a second appeal, the Third Circuit affirmed. *Schwartz II*, ____ F.2d ____, PA-1. This timely petition for writ of certiorari followed.

B. *Factual Background.*

ABSCAM was conceived in 1978 by F. B. I. agents in New York along with a career swindler and convicted felon, Melvin Weinberg. Originally, ABSCAM was designed to recover stolen property, but it evolved into a

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2. Co-defendant Harry Jannotti was convicted by the jury of the Hobbs Act conspiracy but acquitted of the RICO conspiracy.

government-backed endeavor to bribe public officials, thus changing the government's role from that of a traditionally passive buyer of stolen property to an aggressive instigator, seeking out officials and offering bribes to them.

ABSCAM was characterized throughout by clever strategies and substantial inducements—the "honeypot" according to Weinberg—designed to attract potential targets of the scheme. Substantial legal fees, lucrative investment opportunities, and large amounts of money were offered to the victims of the scheme, and the impression of an Arab shiek with vast amounts of money to spend freely was continually fostered by the F. B. I. Likewise, the F. B. I. agents repeatedly and effectively employed the concept of "the Arab mind" or "the Arab way of doing business"[3] to persuade their victims that they must accept the money offered to them to convince the fictitious sheik of their friendship.

The government also recruited and used "middlemen" to assist in the scheme, among them Howard Criden, a Philadelphia lawyer who brought both petitioner Schwartz and Harry Jannotti into the ABSCAM net. Criden, as were various other middlemen, was compensated by contingent fee based upon the number of officials he could produce for the government. He also received continuing promises of substantial, future legal fees and other lucrative investment opportunities. Criden was early taught that the officials who were brought in to meet the sheik's "associates"—the F. B. I. agents—need only come on strong and emphasize their importance, but that no official would be called upon to perform. *See* PA-197-201. The F. B. I. accepted without question Criden's representations regarding the honesty and reputations of public officials whom he was to produce, despite knowledge that on at least one occasion

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3. For the District Court's discussion of the "Arab mind" technique and the manner in which it was employed, see PA-197-198.

Criden had attempted to deceive them in order to obtain one of his contingent fees.

The Philadelphia aspect of ABSCAM was a limited concession to the lobbying of the local United States Attorney, and was designed to test the integrity of city officials.[4] No infiltration or discovery of ongoing criminal activity took place or was intended. Rather, the government created a criminal enterprise and actively attempted to involve innocent persons in its operations. The scenario centered upon the sheik's plan to construct a fictitious $35 million hotel in Philadelphia, with its resultant, major impact on the city's economy. But the record is devoid of any evidence that payments of money to any city official were either sought or required by anyone other than the government, or that any Philadelphia official would have to be "dealt with" in connection with the proposed hotel project.

On 18 January 1980, Criden met with F. B. I. Agent Michael Wald, who passed himself off as a representative of the fictitious sheik.[5] Wald pressed Criden for introductions to various municipal officials. He specifically requested a meeting with petitioner Schwartz and Councilman Louis C. Johanson, Criden's law partner, despite Criden's protestations that their assistance was unnecessary given the sheik's prior relationship with two Philadelphia congressmen. Wald unilaterally raised the issue of payments and agreed to pay Criden $10,000 for the production of Schwartz and Johanson. Criden had never met nor had any prior dealings with Schwartz.

Later that day, Johanson met with Wald. He agreed to support the hotel project and accepted a $25,000 pay-

4. The Philadelphia U. S. Attorney testified that his office actively lobbied for an opportunity to conduct a Philadelphia ABSCAM operation, attempted to devise strategems to justify bringing ABSCAM to the city, and formulated a scenario which would result in violations of federal law.

5. The meeting with Criden, as were the meetings with petitioner Schwartz and Harry Jannotti, was videotaped by the government.

ment. At the end of the meeting, Wald gave Criden $5,000 and promised him "5 for the next delivery." Johanson testified that, based on his earlier meeting with Criden, he thought the payment was a retainer for legal services which his law firm would perform on the hotel project. Johanson also testified that as the meeting progressed, he became aware that it "wasn't kosher." Later, and because he thought he had been duped by Criden, Johanson refused a request by Criden for an introduction to Schwartz or Jannotti, since he felt they were good men whom he did not want to involve in improper activities.

On 23 January 1980, Schwartz met with Criden and Wald.[6] During the meeting, Schwartz repeatedly pitched Philadelphia, told Wald that the "climate is good" for a major construction project, and noted that any problems arising in connection with a proper and legitimate project could be overcome administratively. Schwartz also advised Wald of his power and influence within City Council and that he, Schwartz, had previously rendered assistance to other developers of major construction projects in Philadelphia. Wald assured Schwartz that the project was a legitimate one but emphasized that, if the project was to be built in Philadelphia, he must have Schwartz' assurance that there would be no problems. Schwartz repeatedly advised that no guarantees could be given but that, as long as the project was legitimate, any problems could be resolved.

Significantly, when Wald first mentioned payments, Schwartz made it clear that money was not the motivating factor behind his agreement to assist with

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6. Criden had obtained an introduction to Schwartz through a mutual friend, Philadelphia Common Pleas Court Judge Thomas Shiomos. Shiomos testified that Criden told him that Criden's clients wanted to hire Schwartz as a consultant and to pay Schwartz for his advice and that he, Shiomos, told this to Schwartz. Judge Shiomos testified that he saw nothing "improper or fishy" in this proposal and so advised Schwartz. PA-205-206.

the project. Throughout the meeting, Schwartz discussed the available financing opportunities and the best law firms to employ in connection with the project. Near the end of the meeting, Wald again told Schwartz that he must have Schwartz' unequivocal assurance that everything could be taken care of if he was to report to the sheik that the hotel project could be placed in Philadelphia. Schwartz reiterated that he "cannot give you a guarantee that there won't be any problems" but that so long as the project was legitimate, administrative procedures in Philadelphia could assist in resolving those problems. At the end of the meeting, a payment of $30,000 was given to Schwartz. Wald then gave Criden $5,000 for delivering Schwartz and urged Criden to deliver Harry Jannotti.[7] Although, as with Schwartz, Criden did not know Jannotti prior to the meeting, Criden boasted on tape to Wald that he knew Jannotti well. The F. B. I. did not attempt to verify Criden's plainly false assertions of knowing Schwartz, and it did nothing to verify his assertions concerning Jannotti.[8]

During the trial, the government placed almost total reliance on the video tapes. It presented no independent proof of any actual or potential effect on interstate commerce as a result of petitioner's conduct and, aside from the acts of its own agent, Criden, presented no evidence of a "pattern" of racketeering. Likewise, the government introduced no evidence that petitioner sought, requested

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7. Also, during this meeting between Criden and Wald, Wald pressed for introductions to other city officials with whom he could "deal," naming, among others, the mayor and the former mayor of the city of Philadelphia and various councilmen.

8. On 24 January 1980, Criden produced Jannotti for the hidden cameras. During the Jannotti meeting, and following an initial discussion of the hotel project, Jannotti was repeatedly told by the F.B.I. of the requirments of the "Arab mind," and that the sheik insisted upon making friends and resolving problems before they arose. Wald asserted that the "Arab mind" required that Jannotti accept the payment of money to prove his friendship if the sheik was to construct the hotel in Philadelphia.

(footnote continued)

or otherwise affirmed the need for any payment of money in exchange for official services. Finally, the government introduced no extrinsic evidence of petitioner's predisposition, but relied solely upon the events of the meetings and strained inferences from other peripheral evidence to prove predisposition.

REASONS FOR GRANTING THE WRIT

It is petitioner's position that the creation of crime is an insidious and immoral business and that the government has no place in it. For this and the other reasons set forth below, granting of the writ requested is essential.

The Government's Conduct of ABSCAM Violated the Most Basic Standards of Due Process and Fundamental Fairness, Reaching and Exceeding That Degree of Outrageousness Which Mandates Dismissal of This Prosecution.

The district court in this case applied the "demonstrable level of outrageousness" standard set down in *Hampton v. United States*, 425 U. S. 484, 495 n. 7 (1976) (Powell, J., concurring), and held that the government's conduct and activities in ABSCAM exceeded permissible limits. Petitioners submit that a review of this record will confirm that the district court was correct. Due process in the context of criminal proceedings

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8.—*(continued)*

Jannotti repeatedly expressed his interest in the project, his feeling that the project would be a great benefit to the city, and his support for the hotel because it was a legitimate project. However, each time that Jannotti showed reluctance to accept money, the F.B.I. agent increased the intensity of his presentation until ultimately Jannotti accepted a $10,000 payment. Once Jannotti left, the F. B. I. agents, obviously frustrated because of Jannotti's demeanor and lack of understanding or interest in the proffered payment, expressed their displeasure to Criden.

has received only limited treatment by this Court,[9] but numerous courts of appeals have applied due process concepts,[10] and in several instances have reversed criminal convictions on this very ground.[11] Every factor found relevant to the due process analysis by every court of appeals that has considered the issue is present here in the extreme.

The government instigated, suggested, set in motion, and "scripted" the entire ABSCAM scheme. Governmental involvement was pervasive and extended over the entire period of the scheme. The nature of that involvement was singularly and unfairly designed to lure innocent persons into the net. No evidence of ongoing criminal conduct by petitioner (or any other Philadelphia ABSCAM victim) was present when ABSCAM was injected into his life, nor did any evidence exist of any prior or continuing criminal activities of this type in Philadelphia municipal government at the time the ABSCAM operation arrived. No evidence of petitioner's predisposition, aside from some "puffing" in the course of the governmentally-scripted meetings, was presented by the

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9. *See Sorrells v. United States*, 287 U. S. 435, 459 (1932) (Roberts, J., separate opinion); *Sherman v. United States*, 356 U. S. 369, 381 (1958) (Frankfurter, J., concurring); *United States v. Russell*, 411 U. S. 423 (1973); *Hampton v. United States, supra*. *See also Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting); *Casey v. United States*, 276 U. S. 413 (1928) (Brandeis, J., dissenting).

10. E.g., *United States v. Bocra*, 623 F. 2d 281 (3rd Cir.), *cert. denied*, 449 U. S. 875 (1980); *United States v. Prairie*, 572 F. 2d 1316 (9th Cir. 1978); *United States v. Johnson*, 565 F. 2d 179 (1st Cir. 1977), *cert. denied*, 434 U. S. 1075 (1978); *United States v. Leja*, 563 F. 2d 244 (6th Cir. 1977), *cert. denied*, 434 U. S. 1074 (1978); *United States v. Reifsteck*, 535 F. 2d 1030 (8th Cir. 1976). And see cases cited *infra* at footnote 11.

11. *E.g., United States v. Twigg*, 588 F. 2d 373 (3d Cir. 1978); *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973); *United States v. Russell*, 459 F. 2d 671 (9th Cir. 1972), *rev'd* 411 U. S. 423 (1973); *Greene v. United States*, 454 F. 2d 783 (9th Cir. 1971); *see United States v. West*, 511 F. 2d 1083 (3d Cir. 1975).

prosecution during trial. Rather, extreme inducement was brought to bear on all the victims of the Philadelphia ABSCAM operation through the offer of substantial sums of money, the use of the "Arab mind" ruse, and the government's appeal to the victim's civic duty through representations that, unless money was accepted to evince friendship for the sheik, the hotel project would not be placed in Philadelphia.

The F. B. I. employed middlemen who were paid on a contingent fee basis, a tactic condemned by the Fifth Circuit in *Williamson v. United States*, 311 F. 2d 441 (5th Cir. 1962), *on appeal after remand*, 340 F. 2d 612 (5th Cir.), *cert. denied*, 381 U. S. 950 (1965). It was totally unconcerned with the methods and ploys used by these middlemen to convince persons to participate in the meetings, despite knowledge of prior deception and unconscionable coaching by these very same middlemen. Thus, the government went to extraordinary lengths to create the inducement which preyed upon the weakness of its targets.

The government's conduct throughout ABSCAM was the antithesis of fair and effective law enforcement. There was no reason to suspect either a propensity to engage in criminal conduct on the part of petitioner or the presence of any ongoing criminal activity involving petitioner. Yet, the government directed Criden to inject himself into the petitioner's life with the deliberate intent to lure him into criminal activity and with a conscious design to corrupt him.

The Third Circuit erroneously minimized the significance of the government's activities in ABSCAM by isolating them one from the other. In *Greene v. United States, supra*, the Ninth Circuit recognized that

> "taken individually, none of the factors which we have pointed to as significant would necessarily require reversal of a conviction. *[But in] our view, it is*

> *the combination which is important.*" 454 F.2d at 787 (emphasis added).

The totality of factors present here mandates a ruling in petitioner's favor.

Further, in its analysis of the due process question, the Third Circuit improperly mixed concepts of entrapment and due process, failing to recognize the constitutional underpinnings of the due process defense. For example, although proof that the government had no reason for approaching a victim may be irrelevant in the entrapment context (PA-110), it is and must be a factor in any due process analysis. Similarly, although in the view of the Third Circuit the inducements offered to petitioners by the government may not have been sufficient to sustain an entrapment defense (*see* PA-108), these same inducements may, when viewed in conjunction with the entire scope of unfair governmental activity, be a substantial factor in supporting a due process defense.

Even if, as argued the Third Circuit, the government may employ secretive tactics and deliberate strategems to ferret out dishonesty among public officeholders, that fact does not sanction the government's instigation, control, and total orchestration of the very criminal activity which it intends to prosecute. In every other case in which the due process defense has been denied, governmental involvement in criminal activity has been passive and the basic criminal design has, in each instance, been conceived and carried out in all material respects by the defendants themselves. In none of those cases has governmental instigation of or involvement in criminal conduct risen to the levels which are present in the Philadelphia ABSCAM case.

Here, the government defined the nature of the scheme in an attempt to create the jurisdictional fact—interstate commerce—which would permit it to prosecute this case in the federal courts. In the same

manner, the government, through its manipulation of its captive middleman, Criden, constructed a pattern of bribery which would not have existed but for Criden's presence throughout the scheme.[12] Further, the conduct and language of the F.B.I. agents were deliberately ambiguous and misleading. Indeed, at no time did the government ever ask petitioner whether the payment of bribes was necessary. Moreover, at no point did the government seek to elicit petitioner's understanding of the purpose of the meetings. One must conclude that the agents feared that an explicit approach would have resulted in the flight of their victim.

Finally, a review of the Third Circuit's opinion in *Schwartz I* reveals an extraordinary misconception of the role of the judiciary in our society. In the view of the majority, it is *not* the judiciary's function to determine the constitutional limitations under which our law enforcement agencies are to operate. According to Judge Sloviter:

> "[T]he conduct of agents of the executive branch who must protect the public from crime is more appropriately considered through the political process where divergent views can be expressed in the ballot box." PA-112.

This manifests a total abnegation of the judiciary's obligation to define and enforce the rights of citizens under

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12. The district court found that the government, through the involvement of its own "agent," Criden, created, initiated, and instigated the pattern of bribery "as well as each bribe" upon which the RICO charge is premised, solely to satisfy the requirements of RICO and to permit the exercise of federal jurisdiction over fabricated state bribery charges. Reasoning from *United States v. Archer*, *supra*, Judge Fullam held that absent the government's injection of these elements into the scheme, no proof of a pattern of racketeering activity under 18 U.S.C. §1962(c) could be shown, thereby requiring dismissal of the charges on the ground of manufactured jurisdiction. PA-221. The Third Circuit never addressed this issue.

the Constitution.[13] If this Court will not establish a national benchmark defining limits on law enforcement activity of this type, no citizen will be secure from the clandestine imposition of morality tests conceived and administered by the federal bureaucracy for purposes ranging from the appeasement of overly zealous police-egos to chilling political intimidation.

The District Court's "Bifurcated" Entrapment Charge Erroneously Submitted To The Jury A Question Of Law Reserved To The Court, Shifted The Burden Of Proof To The Defense, And Potentially Withdrew From The Jury Petitioner's Crucial Entrapment Defense. This Comprised Constitutional Error But The Third Circuit Abnegated *Chapman's* "Harmless Beyond A Reasonable Doubt" Standard.

Entrapment was a crucial defense to petitioner Schwartz, to the benefit of which, on the trial record, he

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13. As Judge Aldisert recognized in his dissent:

"[T]he philosophical difference that divides this court depends upon a judge's unspoken notions about the role of the courts. If he or she views the role of the court as a passive one, he or she will be willing to delegate the responsibility for unpopular issues to the jury and not care greatly what the result may be. If he or she views the court as an instrument of society designed to reflect in its decisions the highest values of the American legal tradition, he or she will be more likely to risk public disapproval and to measure an unpopular cause against the highest ideals and aspirations of the time.

"The rights conferred upon our society by judges of the Third Article emanated from cases in which the defendants were unpopular and generally regarded as transgressors—Dollree Mapp, Danny Escobedo, and Ernesto Miranda quickly come to mind. In each case, a court, not a jury, drew the line of demarcation between permissible and impermissible police conduct to insure that enforcers of society's laws would not violate established moral frontiers while exercising their stewardship; it was federal judges, unmindful of editorials and broadcast plaudits, who chose to stand tall and unbending." PA-126. (footnote omitted).

was entitled as a matter of law, and as to which he was equally entitled to have the jury fairly and adequately instructed. The district court determined that sufficient evidence had been adduced to warrant giving an entrapment charge, but erroneously gave a "bifurcated" charge,[14] incorrectly focusing the jury's deliberations extensively and primarily on the threshold question of inducement and only secondarily on the central, determinative question of predisposition.[15] It discussed at length the facts and opposing arguments relating to inducement and "repeatedly" (*Schwartz II*, ____ F.2d at

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14. The district court's "bifurcated" entrapment charge submitted to the jury: (1) the threshold question whether the defense had produced sufficient evidence of governmental initiation of the criminal activity charged, and wrongful inducement of petitioner Schwartz into that activity, as to merit an entrapment defense; and (2) if so, the question whether the prosecution had produced evidence sufficient to persuade the jury beyond a reasonable doubt that Schwartz had been predisposed to commit the activity any way. The court instructed the jury that if it did not *find* inducement, it need not consider predisposition. The court thus shifted the burden of proof to the defense and instructed the jury to withdraw entrapment from its consideration if the defense had not proven inducement. *Schwartz II*, ____ F.2d ____, slip op. at 18-21, PA-18-21.

Discussing the evidence, the district court indicated that inducement might be found from Howard Criden's maneuvers to gain Schwartz' attendance at the meetings and other activities, but that was only chargeable against the government if the jury also found that Criden was the government's agent. The court also stated that the jury might find inducement from the acts of the F.B.I. undercover agents themselves at the meetings. PA-244-245.

15. The court's charge on entrapment comprises approximately 18 pages in the trial transcript (PA-243-253, 262), some 15 of which are devoted to the threshold question of inducement (PA-243-251, 253, 262) and only 3 of which are devoted to the central, determinative question of predisposition (PA-251-253). The court told the jury to "draw a sharp line" (PA-244) between the government merely providing an opportunity to commit crime and inducing "an innocent defendant" (*ibid.*) to commit crime.

The district court's entire charge to the jury, including its supplemental charge after side-bar objections and further supplemen-

(*footnote continued*)

____, slip op. at 20, PA-20) instructed the jury that the real issue to be determined was inducement.[16]

In so doing, the district court allowed the jury to second-guess a threshold question of law reserved to the court. Further, the court shifted to petitioner Schwartz an affirmative burden of proof on the question of inducement, but the court gave the jury no standard of measure or quantum of proof by which to judge whether the evidence was sufficient to support the *finding* of inducement which it instructed them to make.[17] Thus, the court opened to the jury a path to conviction which, if the jury should travel it, withdrew the critical defense of entrapment from the jury's consideration even though on the evidentiary record petitioner was entitled to the defense as a matter of law.

The presumption of innocence is an axiomatic, fundamental proposition of constitutional dimension in our

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15.—*(continued)*
tal charge upon entertaining a question from the jury, is reprinted at PA-229. The portions of the charge dealing with entrapment issues are found at PA-243. The Third Circuit's discussion and treatment of the district court's entrapment charge is found in *Schwartz II*, ____ F.2d ____, slip op. at 16-22, PA-16-22.

16. PA-243 ("[t]he issue really is" inducement), 250 ("the issue here is simply" inducement), 253 ("the specific question" is inducement), 262 ("[i]f you find" inducement).

17. The district court instructed the jury that before the government's burden to disprove entrapment by proving petitioner Schwartz' predisposition beyond a reasonable doubt was triggered,

> "the evidence must lead you to believe that the Government induced the defendant to commit the crime charged." PA-243.
>
> . . .
>
> "If you find from the evidence that there was inducement, . . . that is, if you accept as correct the inferences urged upon you be defense counsel . . ., if you find those facts to be correct, then that would amount to inducement and you would therefore acquit the defendants unless the evidence as a whole satisfies you beyond a reasonable doubt that they were predisposed." PA-262.

criminal jurisprudence. Equally axiomatic, fundamental and constitutionally impelled is the rule that the evidence need only admit of a reasonable doubt to gain the defendant's acquittal. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 1933 (1978). There was no question by the Third Circuit that the evidence fairly raised the spectre of entrapment and that petitioner was entitled to an instruction focused on the factual question of predisposition and explicitly placing the burden on the government to prove predisposition beyond a reasonable doubt. Operation of the presumption of innocence in combination with the burden of persuasion then entitled petitioner to acquittal in the mere presence of a reasonable doubt as to his predisposition.

By placing the burden of proof on petitioner Schwartz and requiring of the jury an affirmative finding of inducement, instead of simply the presence of a reasonable doubt as to predisposition, the district court compromised the presumption of innocence and denied petitioner the full benefit of the reasonable doubt standard. *See, e.g., Davis v. United States*, 160 U.S. 469, 16 S.Ct. 353 (1895) (in federal murder prosecution, evidence fairly raised issue of insanity; *held* presumption of innocence then entitled defendant to acquittal upon reasonable doubt as to sanity); *United States v. Reed*, 658 F.2d 1225, 1236-1239 (7th Cir. 1981) (conflicting evidence merited charge on withdrawal from conspiracy; erroneous withdrawal instruction shifting burden to defendant and requiring finding of withdrawal, not merely reasonable doubt as to membership, *held* prejudicial and reversible error); *Berrier v. Egeles*, 583 F.2d 515, 517-518 (6th Cir.) (shifting burden to defendant to prove self-defense *held* constitutional error comprising plain error cognizable in collateral attack on conviction despite failure to object below), *cert. denied*, 499 U.S. 955, 99 S.Ct. 354 (1978); *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977) (instruction on affirmative defense of self-defense which "suggests that the burden is

on the defendant" *held* compromised beyond-a-reasonable-doubt standard and reversible error); *United States v. Alston*, 551 F.2d 315 & 316 n.9 (D.C. Cir. 1976) (instruction on affirmative defense of alibi suggesting burden shifted to defendant *held* "error of constitutional dimension" and not harmless beyond a reasonable doubt). And by creating the potential for withdrawing the entrapment defense when the issue was fairly raised by the evidence, the district court potentially denied due process by denying the benefit of the jury's informed consideration (upon proper instruction) of a defense to which the defendant was entitled as a matter of law. *United States v. Benavidez*, 558 F.2d 308 (5th Cir. 1977) (court's inadvertent neglect to charge on entrapment when evidence fairly raised the issue *held* constitutional, plain error cognizable on appeal despite failure to object below).

The district court thus injected constitutional error into the trial. Because of the trial court's erroneous entrapment instruction, "the jury was not in a position to fairly evaluate the defendant's case" (*Benavidez, supra*, 558 F.2d at 310). Although on the evidence "the issue was fairly raised [it] could not be fairly decided" (*ibid.*), and petitioner Schwartz was denied the fair trial to which he was constitutionally entitled.[18] On appeal, the

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18. Controlling precedent in the Third Circuit expressly condemned the type of bifurcated entrapment charge given by the district court here. *United States v. Watson*, 489 F.2d 504 (3rd Cir. 1973); *Government of the Virgin Islands v. Cruz*, 478 F.2d 712, 716-718 (3rd Cir. 1973). Moreover, at least until the instant decision, the Third Circuit clearly considered the error in a bifurcated entrapment charge to be not only constitutional error, but to be rendered so inherently prejudicial by the shifting burden and potential for confusion as to require reversal *per se*. *Watson, supra*, 489 F.2d at 510-511 & n.10; *Cruz, supra*, 478 F.2d at 718 n.7. *See United States v. Booz*, 451 F.2d 719, 723-724 (3rd Cir. 1971) (potential for jury confusion as to shifting burden of proof under charge on alibi defense coupled with failure specifically to instruct on prosecutor's burden to disprove defense *held* reversible error *per se*).

Third Circuit was required to determine whether the error was harmless beyond a reasonable doubt. *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824 (1967); *United States v. Alston*, 551 F.2d 315, 316 & n.9 (D.C. Cir. 1976). The Fifth, Sixth and Ninth Circuits require *per se* reversal for such erroneous entrapment charges. *United States v. Wolffs*, 594 F.2d 77, 79-84 (5th Cir. 1979); *United States v. Tate*, 554 F.2d 1341, 1343-1345 (5th Cir. 1977); *United States v. Ambrose*, 483 F.2d 742, 753 (6th Cir. 1973); *United States v. Dearmore*, 672 F.2d 738, 740-741 (9th Cir. 1982); *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966).

In conflict with applicable decisions of this Court, in direct conflict with decisions in the Fifth, Sixth and Ninth Circuits, and in defiance of precedent within its own circuit (note 18 *supra*), the Third Circuit panel in *Schwartz II* not only declined to invoke a *per se* rule of reversal but refused even to acknowledge the constitutional dimension of the error, and thus refused to apply *Chapman's* "harmless beyond a reasonable doubt" standard. *Schwartz II*, ____ F.2d ____, slip op. at 21-22, PA-21-22. This Court's exercise of certiorari jurisdiction is necessary to resolve the conflict thus created.

Applying its test for the harmlessness of non-constitutional error, the Third Circuit held that the district court's erroneous instructions on entrapment were harmless because inducement was "patent" from the fact that the government had created "an elaborate fiction", and because the government's evidence (the videotapes of the meetings) "overwhelmingly" established predisposition by showing that petitioner readily assented to take the money. *Schwartz II*, ____ F.2d ____, slip op. at 21-22, PA-21-22. But the district court submitted the inducement question to the jury for determination as a disputed fact, and clearly told the jury that it was free to decide that question against petitioner

Schwartz.[19] PA-244-248, 250-251, 256. Moreover, the court instructed that the jury must affirmatively *find* inducement before the government's burden to prove predisposition beyond a reasonable doubt would be triggered (PA-243, 253, 262), thus creating the real potential for the entrapment defense to be withdrawn from the jury's consideration. As to predisposition, the district court was not so convinced of the "overwhelming" nature of the evidence as was the Third Circuit. The court instructed the jury that there was "little or no evidence of predisposition other than the fact that the defendant did indeed accept the money without too much argument . . . ." PA-252. And in its order setting aside the jury's verdict of conviction, the district court held that the evidence was insufficient to prove predisposition beyond a reasonable doubt. PA-223. It cannot be said on this record that the evidence of predisposition was so overwhelming as to render the constitutional error in the instructions harmless beyond a reasonable doubt. This Court's grant of certiorari jurisdiction is therefore necessary to clarify the application of the *Chapman* standard to instructional errors such as were committed here.

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19. The factual question whether Criden was an agent of the government was intimately tied to the inducement issue. The district court told the jury that it could look to the acts of Criden as evidence of inducement, but only if it found that Criden was an agent of the government. PA-244-245, 250. Under the court's instructions, the jury was free to conclude that Criden was merely an independent intermediary whose actions were not chargeable against the government, and thus to find no inducement. PA-244-245. In that event, the jury would not determine whether the prosecution had proven predisposition beyond a reasonable doubt and the entrapment defense would be withdrawn.

Where the Evidence of Governmental Inducement Is Overwhelming, the Government May Not Rely Upon Evidence of "Ready Acquiescence" Manufactured by It to Meet Its Burden, Nor Can a Court Sustain a Conviction in an Entrapment Case on Proof of Commission of the Criminal Act Alone.

Although recognizing that under the law of entrapment it is the government's burden to prove predisposition beyond a reasonable doubt, the Third Circuit ignored this standard of proof and permitted the verdict below to stand on evidence of the commission of crime alone. If the court's ruling is not reversed, the entrapment defense will have been obliterated.

Predisposition involves a difficult inquiry into the defendant's subjective state of mind. "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells v. United States*, 287 U. S. 435, 451 (1932). Subsumed within any discussion of entrapment is the complex, intertwined relationship between inducement and predisposition. As the Third Circuit itself recognized in *United States v. Watson*, 489 F. 2d 504 (3d Cir. 1973):

> "[T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition," *Id.* at 511.

The extraordinary degree of governmental inducement in this case has already been reviewed. Given evidence of these overwhelming inducements, the government's evidentiary burden to prove predisposition was susbstantial. But the majority in *Schwartz I* abjured any necessity to conduct a review of the entire record, despite its profession of the appropriateness of such a procedure. PA-87-99. Instead, as Judge Aldisert pointed

out, it satisfied itself with a rebuttal of the items relied upon by the district court in entering judgment of acquittal. PA-138-139. In so doing, the court again relieved the government of *its* obligation to prove predisposition by good and sufficient evidence and effectively shifted the burden of disproof onto petitioner. Petitioner submits that a review of the record will plainly demonstrate that not a scintilla of evidence exists to establish the requisite predisposition, let alone to counterbalance the weight which must be accorded to the uncontradicted proof of massive governmental inducement.

Second, although appreciating that predisposition has been historically proven by, for example, proof of a defendant's prior convictions, his participation in similar transactions or proof of bad character, the *Schwartz I* majority made the startling observation that since "[s]uch evidence would be extremely difficult to produce in the case of acceptance of a bribe by a public official . . . the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented." PA-99-100.

Proof of the criminal act, a fact which must be admitted of necessity by a criminal defendant arguing entrapment, is thus, for the Third Circuit, enough when it is a public official who is in the dock. No basis for the application of such a double standard exists in our law.

Further, even if one accepts the Third Circuit's abstract proposition that the demeanor of the petitioner during the commission of the criminal act is sufficient proof upon which to premise a finding of predisposition, attention must be directed to the nature of that proof which was presented at trial.

In this case, the government created the scheme, sent out its agent, Criden, to recruit the victims of the scheme, enticed the petitioners to attend staged meetings, orchestrated and scripted every aspect of those meetings, and controlled the flow of conversation to the extent that the petitioners' statements were always

made in response to continuously monitored specific inquiries of the government. The conduct and conversation of the government's agents at the meetings were admittedly designed for the sole purpose of obtaining evidence to be used in a future proceeding. Nevertheless, it is this very evidence and only this evidence—this demeanor of petitioner at the meetings—which the government now contends is sufficient to satisfy its burden of proof of predisposition.

No logic exists which would justify a finding that the government may mold and manufacture the "ready response" evidence and then rely upon this evidence as the sole proof of predisposition. In no case in which proof of governmental inducement was as overwhelming as in this case has any court permitted a conviction to stand on the flimsy "ready acquiescence" evidence presented here. Here, petitioner neither said nor did anything tending to establish pre-existing criminal inclinations, nor demonstrated previous experience with similar criminal activity. In short, there was no evidence to show that when the government's overtures first came to the attention of Schwartz that he was already predisposed to accepting bribes.

At bottom, the court's rejection of the entrapment defense rests upon the simplistic notion that all petitioner had to do when offered the money was to say "no thanks." PA-104. Such an approach to the difficult jurisprudential problem raised by this case is wholly unacceptable. Peeling away the veneer of language in the court's opinions in *Schwartz I* and *Schwartz II*, one finds only the proposition that petitioner must be punished for immorality, and the defense of entrapment must be seriously compromised or, indeed, eradicated to achieve this result.

The Third Circuit's Ruling on Hobbs Act Jurisdiction in This Case Conflicts With the Rulings of Three Courts of Appeals, Impacts on All Federal Criminal Legislation Enacted Under the Commerce Clause, Misapplies Prior Holdings of This Court, and Is Erroneous Under the Facts of This Case.

The interstate commerce requirement in the Hobbs Act, 18 U.S.C. §1951, is a jurisdictional prerequisite to any prosecution under that Act. As this Court held in *United States v. Feola*, 420 U.S. 671, 695 (1975), in an analogous circumstance, "[t]he jurisdictional requirement is satisfied by the *existence of facts* . . . ." (Emphasis added). In its decision below, the Third Circuit completely disregarded this fundamental concept, established a standard of proof directly in conflict with the standards employed by the Fourth, Seventh, and Ninth Circuits, sustained a conviction for Hobbs Act conspiracy where no jurisdictional fact was or could have been proven, misinterpreted this Court's prior decisions in *Feola* and *Perez v. United States*, 402 U.S. 146 (1971), and demonstrated a basic misunderstanding of the jurisdictional limitations inherent in all federal legislation. Because the Third Circuit's determination, in the Hobbs Act context, as to the extent of Congress' power under the commerce clause "will have ramifications for all federal criminal statutes enacted under Congress' commerce clause power" (PA-72), review of the Hobbs Act issues raised herein is imperative.

First, in *United States v. Staszcuk*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert denied*, 423 U.S. 837 (1975), Judge, now Justice, Stevens addressed the interstate commerce issue raised by the Hobbs Act, and held:

> "[T]he statutory language [of the Hobbs Act] . . . requires the prosecutor to prove some connection with interstate commerce in every case. We hold, however, that the commerce element of a Hobbs Act violation — *the federal jurisdictional fact* —

> may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. . . . *[J]urisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.*
>
> *"The jurisdictional inquiry must, of course, focus on the situation at the time of the offense." Id. at* 59-60. (Emphasis added) (Footnotes omitted).

Since 1975, the "realistic probability" test enunciated in *Staszcuk* has continued to be the law in the Seventh Circuit and has been adopted and uniformly applied by the Fourth and Ninth Circuits.[20]

In this case, the government-created scheme was wholly fictitious. The government did not prove at trial that, had the scheme been carried out, commerce would have been affected.[21] Likewise, since the government, through its agents, never had any intention to implement the scheme, there never existed any realistic possibility that the charged conspiracy would ever have an effect upon interstate commerce. Despite these undisputed facts, the Third Circuit held that where a defendant's conduct constitutes "a sufficient threat to interstate commerce so as to implicate an 'area of federal concern'," federal jurisdiction is established. *Schwartz I*, 673 F.2d at 592, PA-75. Thus, in direct conflict with

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20. *E.g., United States v. Rindone*, 631 F.2d 491, 493 (7th Cir. 1980); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976) (per curiam), *cert. denied*, 433 U.S. 909 (1977). Numerous other Courts of Appeals have referenced the *Staszcuk* formulation in passing on Hobbs Act jurisdiction issues, including the Third Circuit itself. *E.g., United States v. Cerilli*, 603 F.2d 415, 424 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

21. It is undisputed that no evidence, of any nature, was introduced at trial by the government to show that the alleged conspiracy would have had *any* effect, actual or potential, on commerce if performed. PA-176.

Staszcuk, the Third Circuit wrongly substituted a wholly subjective test, which would rest federal jurisdiction upon hypothetical, imaginary or non-existent effects on commerce.

Under the rationale of *Feola*, jurisdiction must be predicated upon facts. In *Feola*, the jurisdictional nexus under 18 U.S.C. §111 is satisfied by the existence of a *fact*, the presence of a federal officer, just as jurisdiction under the Hobbs Act is based upon the existence of a fact—an effect on interstate commerce. If A and B conspire to assault X and X turns out to be a federal officer, the federal jurisdictional fact, and in turn federal jurisdiction, is present. However, if A and B conspire to assault X whom they *mistakenly* believe to be a federal officer, the federal jurisdictional fact is not present. Likewise, if a federal agent *tells* A and B that X, a federal officer, will be arriving to arrest them, and A and B conspire to assault X if he arrives, but X is a fiction created in the federal agent's imagination, just as was the hotel project in ABSCAM, there can be no federal jurisdiction.

Federal jurisdiction is not predicated solely upon the state of mind of the defendants. Fictions cannot replace jurisdictional facts. In this case, measured by the *facts*, no effect on commerce could ever take place. Here, the federal agents unilaterally fashioned a scheme which they hoped would satisfy jurisdictional requirements. In each case relied upon by the Third Circuit, however, the nature and extent of the conspiracy — the substance of the criminal design — was formulated by the defendants themselves.[22]

If the focus of the jurisdictional inquiry is upon the conspiratorial agreement, *see United States v. Feola*, *supra*, 420 U.S. at 695-96, it is both illogical and patently unfair to sanction governmental manipulation of that agreement solely to create federal jurisdiction. If the purpose of the *federal* conspiracy laws is to provide fed-

22. *See* cases cited in *Schwartz I*, 673 F.2d at 592-593, PA-74-77.

eral law enforcement officials with the tools necessary to combat criminal conduct in "areas of federal concern," it is likewise illogical to contend that these same officials may unilaterally create an "area of federal concern" in any given case so that they may prosecute it.

Whether one accepts Judge Aldisert's formulation that "[a] purely hypothetical effect, a fairy tale conjured by the FBI . . . is not 'a sufficient threat to [commerce] so as to give rise to federal jurisdiction,' " or one employs Judge Friendly's "manufactured jurisdiction" approach, *United States v. Archer, supra,* 486 F. 2d at 682, the reality is that no real, actual impact on commerce could have ever occurred in this case. This case, even more than *Archer,* epitomizes the concept of "manufactured federal jurisdiction."[23]

The Third Circuit completely misunderstood *Feola. See* 420 U. S. at 695-96.[24] As Judge Aldisert recognized:

> "The majority interweaves its jurisdicitonal argument with the argument that factual impossibility of completing a substantive offense does not bar a conviction of conspiracy. *They confuse proof of the crime of conspiracy with the jurisdictional power to*

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23. In its opinion, the district court stated:

"Moreover, to permit this kind of artificial federalization *would effectively remove virtually all of the limitations upon the criminal jurisdiction of federal courts, and would be utterly contrary to accepted notions of federalism.*" 501 F.Supp. at 1204, PA-221 (emphasis added).

24. In her opinion, Judge Sloviter remarked:

"In holding [in *Feola*] that there was a 'sufficient threat' to an 'area of federal concern' to meet the jurisdictional requirements as long as a federal officer was in fact the target of the planned attack, 420 U. S. at 695, *the Court did not preclude the existence of federal jurisdiction where the intended victim is believed to be a federal officer, but in fact is not.*" *Schwartz I,* 673 F.2d at 593, PA-78 (emphasis added). But *Feola* clearly requires that the victim of the agreement to assault *must* be a federal officer for federal jurisdiction to attach.

> *punish the crime*. The presence of subject matter jurisdiction is a discete and primary issue in each case presented to a federal court, unlike a state court. The effect on commerce is both jurisdictional and substantive in a Hobbs Act prosecution, but the two inquiries are separate and distinct. *See, e.g., Feola*, 420 U. S. at 694-96." *Schwartz I*, 673 F.2d at 626 , PA-147 (emphasis added).

Not only are the two inquiries "separate and distinct," but also the standards by which they are determined differ. Respecting proof of the substantive offense, the subjective criminal intent of an alleged Hobbs Act defendant is crucial; respecting proof of Hobbs Act *jurisdiction*, however, the subjective criminal intent of a Hobbs Act defendant is irrelevant; it can neither create nor negate the jurisdictional fact. In *Staszcuk*, Judge Stevens understood this distinction and formulated a test which respected it. Judge Sloviter, in her opinion for the court below, adjured the limitations inherent in the commerce clause power, but established a test which shifts the focus of the jurisdictional inquiry away from the "existence of [real] facts" and to the subjective intent of the actor. As a result, the objective "realistic probability" test established by *Staszcuk* has been disembowled by the Third Circuit and the requirement in *Feola* that jurisdiction be predicated on fact has been eliminated.

It is petitioners' position that the Third Circuit, by its ruling, has abolished all jurisdictional limitations which heretofore existed under the Hobbs Act and has constructed a standard "which in practicality would extend federal jurisdiction over just about any robbery or extortion." *United States v. French*, 628 F. 2d 1069, 1077 (8th Cir.), *cert. denied*, 101 S. Ct. 364 (1980).

A Conviction for Extortion Under the Hobbs Act Absent Proof of a Demand or Request by a Defendant Should Not Be Permitted, and Clarification of This Issue Is Essential.

A plain reading of the definition of "extortion' in the Hobbs Act shows that proof of demand is necessary to

convict. The district court held in part that the absence of proof of any express or implied demand or request for payment by petitioner required dismissal of the Hobbs Act charges. 501 F.Supp. at 1185, PA-178-179. The Third Circuit reversed, asserting that the law is clear throughout the circuits that proof of inducement by a public official acting "under color of official right" is unnecessary. *Schwartz I*, 673 F.2d at 594-595, PA-79-81. Petitioners submit that both the decision of the Court of Appeals and its rationale are incorrect.

The First, Third, and Eighth Circuits have each approved jury instructions which require a specific finding of inducement.[25] In fact, except for *Staszcuk*, where insufficient detail is provided to determine whether affirmative action was taken by the defendant, and *United States v. Hedman*, 630 F. 2d 1184 (7th Cir. 1980), *cert. denied*, 450 U. S. 965 (1981), which does nothing more than cite, as "settled law," the very cases which either include evidence of inducement or approve a charge on inducement, there is no decision under the Hobbs Act involving a public official which sustains an extortion conviction absent evidence of inducements, or of "initiative and purpose," *United States v. Hyde*, 448 F. 2d 815, 833 (5th Cir. 1971) (Wisdom, J.), *cert. denied*, 404 U. S. 1058 (1972) on the part of the official.[26]

In this case, it is clear that neither petitioner nor anyone acting on his behalf, at any time, requested or demanded money in connection with the proposed construction of the hotel in Philadelphia or in exchange for petitioner's use of his official position. Rather, the evidence is clear that petitioner was, at most, the passive recipient of money and would have supported the pro-

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25. *See United States v. Hathaway*, 534 F. 2d 386 (1st Cir.), *cert. denied*, 429 U. S. 819 (1976); *United States v. Addonizio*, 451 F. 2d 49, 59 (3d Cir.), *cert. denied*, 405 U. S. 936 (1972); *United States v. Adcock*, 558 F. 2d 397 (8th Cir.), *cert. denied*, 434 U. S. 921 (1977).

26. "In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." *United States v. Addonizio, supra*, 451 F. 2d at 72, *citing People v. Dioguardi*, 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960).

posed project whether or not any money was paid to him.

In those cases decided under the Hobbs Act in which public officials were not defendants, the law has long been clear that, in the absence of proof that defendants induced or intended to induce payment, the mere acceptance of a bribe does not constitute extortion or violate the Hobbs Act. *E.g., United States v. Gerald*, 624 F. 2d 1291 (5th Cir. 1980), *United States v. Duhon*, 565 F. 2d 345 (5th Cir.), *cert. denied*, 435 U. S. 952 (1978), *United States v. Hyde, supra.*[27] And, as noted above, given the requirement of inducement even in official corruption cases and the fact that no case involving official corruption has ever resulted in conviction of the defendant absent proof of a request or demand, the Third Circuit's reading of the Hobbs Act statute and the conclusion which it reached are clearly incorrect. Clarifiction of this troublesome issue is plainly warranted.

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit and review and correct the decision below.

Respectfully submitted,

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27. Indeed, no rational argument can be made to support divergent approaches to the Hobbs Act. As the Fifth Circuit stated: "[t]he distinction from bribery is therefore the initiative and purpose on the part of the [defendant] and the fear and lack of voluntariness on the part of the victim." *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972).